September 6, 2018

***Ex Parte* Notice**

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: ***Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84; *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79**

Dear Ms. Dortch:

By this letter, NTCA–The Rural Broadband Association ("NTCA") supports the recent submission by Crown Castle regarding the barriers to broadband deployment presented in certain instances by the need to place communications network facilities near or under railroad crossings. *See Ex Parte* Letter from Robert Millar, Associate General Counsel, Crown Castle, to Marlene H. Dortch, Secretary, Federal Communications Commission ("Commission"), WC Docket No. 17-84 and WT Docket No. 17-79 (dated June 1, 2018) ("*Crown Castle Letter*").

Although unfettered monopoly control of certain tracts of land by railroads may have made sense a century or more ago, NTCA agrees with Crown Castle that in today's communications environment – where facilities can be placed in a routine manner that presents no disruption to existing use – laws that permit railroads to act as unconstrained "gatekeepers" with respect to railroad crossings that intersect with public rights-of-way ("ROWs") are inconsistent with a 21st century digital economy. Indeed, as described in Crown Castle's letter and further below, any state or local laws that enable and empower railroads to stop broadband deployment when it would otherwise proceed in public ROWs would constitute barriers to efficient deployment of telecommunications infrastructure that are inconsistent with the provisions of Section 253 of the Communications Act of 1934, as amended. As discussed further below, such concerns were also reflected in the State Model Code developed by the Commission's Broadband Deployment Advisory Committee, which included an article focused specifically on ensuring reasonable rates, terms, and conditions for installation and maintenance of communications network facilities that travel along or traverse railroad crossings.

By way of background, NTCA represents nearly 850 independent, community-based telecommunications companies and cooperatives, as well as more than 400 other firms that support or are themselves engaged in the provision of communications services in the most rural portions of America. NTCA's network operator members are both full service rural local exchange carriers ("RLECs") and broadband providers. These are "hometown" small businesses, delivering voice and broadband (and other services) in areas left behind long ago by larger operators, and in the vast majority of cases, these providers represent the only communications networks in the very rural areas they serve. Their networks – and the ability to upgrade and extend them over time – to deliver improved services to existing customers and new services to neighboring unserved areas – are critical to the broader mission of universal service in rural America.

Unfortunately, even as they look to promote greater availability and affordability of quality voice and broadband services for rural consumers, NTCA members are all too familiar with the kinds of excessive fees and unreasonable requirements described by Crown Castle. *See Crown Castle Letter*, at Memorandum p. 4. For example:

- One NTCA member received a request from a business for a fiber broadband connection lacking one currently. Providing the connection to the potential customer involved the underground installation of fiber in a public ROW adjacent to a state highway that at one point intersected with the railroad crossing at issue. The railroad quoted fees of nearly $20,000, which was composed of more than $10,000 for the permit once it was issued, a separate upfront application fee, an "engineer mobilization" fee, and a "flagging/observer" fee; the railroad also required the broadband provider to purchase insurance at a cost of nearly $2,000. These fees as quoted by the railroad did not include any of the construction fees that the broadband provider was also required to incur. When the business customer balked at the special construction cost associated with such fees and a local economic development coordinator intervened, the railroad reduced its quote by several thousand dollars. The boring of the fiber was completed in one day, traversing a grand total of 15 feet under the railroad crossing and emerging on the other side also in the public ROW.

- One NTCA member company was recently quoted an application fee of $750 and a yearly rental fee of several thousand dollars per year (with a built-in annual increase) for boring beneath a railroad track. The fiber installed under the railroad will not touch railroad property on either side of the track.

- One member paid nearly $50,000 in fees (including permit and "observation" fees) for building under two railroad lines. The process of negotiating the fees and obtaining the final permits for the crossings took eight months.

- Members have also found that the existence of state statutory provisions capping railroad crossing fees has led the railroads to simply increase "safety" or "observation" fees (to amounts ranging higher than $1,000 for what amounts to an hour of work for boring under a railroad track) as an offset.

Such practices clearly impede the deployment of networks aimed at delivering voice and broadband services in rural America. And, as Crown Castle notes, barriers such as these may not be erected in a vacuum – in certain cases at least, such practices may occur either within public ROWs or with respect to crossings that intersect with public ROWs against a backdrop of state and local property laws that confer authority upon them to do so. *Id.* at Memorandum pp. 5-7. Crown Castle rightly states, therefore, that such laws constitute barriers to entry that prohibit or have the effect of prohibiting an entity's ability to provide telecommunications service. *Id.* at Memorandum pp. 2-3. Moreover, Crown Castle correctly notes that claims by railroads that such ROW crossings involve "private agreements" fall short to the extent that those agreements are in fact crafted against a backdrop of state or local laws. *Id.* at Memorandum p. 7. Finally, Crown Castle is correct when it observes that any action taken pursuant to Section 253 in the event that state or local laws are implicated would not constitute a regulatory taking, as the minimal "intrusion" of communications network deployment and operation does not interfere with the railroads' continued use of the ROW – and the railroad would receive reasonable compensation for any use that is made. *Id.* at Memorandum pp. 9-10. In addition, it is important to note that any action taken by the Commission pursuant to its Section 253 authority can and should be invoked in those instances where it is found that a state or local law is being utilized by railroads or their agents as underlying authority for their "gatekeeper" status and resulting in barriers to broadband deployment. Commission action in this regard would and should not interfere with state laws that, for example, are found to set already a reasonable fee for access to railroad crossings and/or to set reasonable timelines for the processing of requests for such access.[1]

Beyond the arguments raised by Crown Castle, it is also worth noting the impact on ratepayers – both rural and urban – if railroads can charge excessive fees or impose unreasonable conditions for crossings in rural America. NTCA members operate in large, sparsely populated geographic areas where the costs of deploying and operating networks are often far in excess of what similar efforts would involve in urban areas. In the absence of universal service fund ("USF") support, consumers in these rural areas would be required to pay rates far in excess of what urban consumers pay for reasonably comparable communications services – and excessive fees charged for rural ROW crossings only drive up those costs further. In many cases, the USF programs provide at least some level of support to help make prices more reasonably comparable between rural and urban areas. But, here again, to the extent that railroads can charge excessive fees for rural ROW crossings, USF is effectively subsidizing these costs of network deployment – meaning that *urban* consumers are paying more as well due to the high costs of railroad crossings in rural America. Thus, excessive railroad fees negatively affect the rates paid by rural consumers and the costs of maintaining universal service as borne by all Americans.

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[1] This should include both state laws on the books already on the books and any adopted that are similar in scope and intent to the provisions set forth in the Broadband Deployment Advisory Committee state model code. Broadband Deployment Advisory Committee, *State Model Code for Accelerating Broadband Infrastructure Deployment and Investment*, Article 6: Special Provisions for Railroad Crossings (Jul. 9, 2018), available at: https://www.fcc.gov/sites/default/files/bdac-07-2627-2018-harmonization-wg-model-code-states.pdf.

Thank you for your attention to this correspondence. Pursuant to Section 1.1206 of the rules of the Commission, a copy of this letter is being filed via ECFS.

Sincerely,

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